In the Supreme Court of the United States.

OCTOBER TERM, 1922.

COMMERCIAL TRUST COMPANY OF NEW Jersey, appellant,
v.
THOMAS W. MILLER, AS ALIEN PROPERTY Custodian, appellee.
} No. 575.

CHARLES J. AHRENFELDT, APPELLANT,
v.
THOMAS W. MILLER, AS ALIEN PROPERTY Custodian, appellee.
} No. 576.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION TO ADVANCE.

Comes now the Solicitor General and moves the court to advance the above entitled cases to be heard with the case of *Frederick Wesche, Appt.* v. *Thomas W. Miller, Alien Property Custodian*, No. 292, on April 9th next, and to consolidate the three cases for the purpose of briefing and arguing.

The case of *Wesche* v. *Miller*, on appeal from the United States District Court for the District of New Jersey, and the two above entitled cases are based on the same statement of facts and are practically similar in all respects.

On September 11, 1920, the Alien Property Custodian filed a petition in equity under the Trading with the Enemy Act against the Commercial Trust Company of New Jersey, in the United States District Court for the District of New Jersey, for the delivery of certain money and bonds alleged to be the property of an alien enemy. On February 21, 1921, motions to intervene were filed on behalf of Frederick Wesche and Charles J. Ahrenfeldt claiming to be partial owners of the said money and bonds. On January 16, 1922, orders denying the applications of Wesche and Ahrenfeldt to intervene were filed. On January 19, 1922, a final decree was filed conveying the said money and bonds to the custody of the Alien Property Custodian. Wesche on January 19, 1922, took an appeal direct to this court, and on January 19, 1922, the Commercial Trust Company and Charles J. Ahrenfeldt were allowed appeals to the United States Circuit Court of Appeals for the Third Circuit, which court on August 1, 1922, affirmed the decrees of the District Court. From that affirmance appeals were taken to this court on August 11, 1922.

For the conservation of time and for the convenience of the court, it is submitted that these two cases should be advanced to be heard with case No. 292, in the time of one case, on April 9th next, for which date a stipulation to restore to the call has been filed.

Counsel for the Appellants concur in this motion.

JAMES M. BECK,
Solicitor General.

FEBRUARY, 1923.

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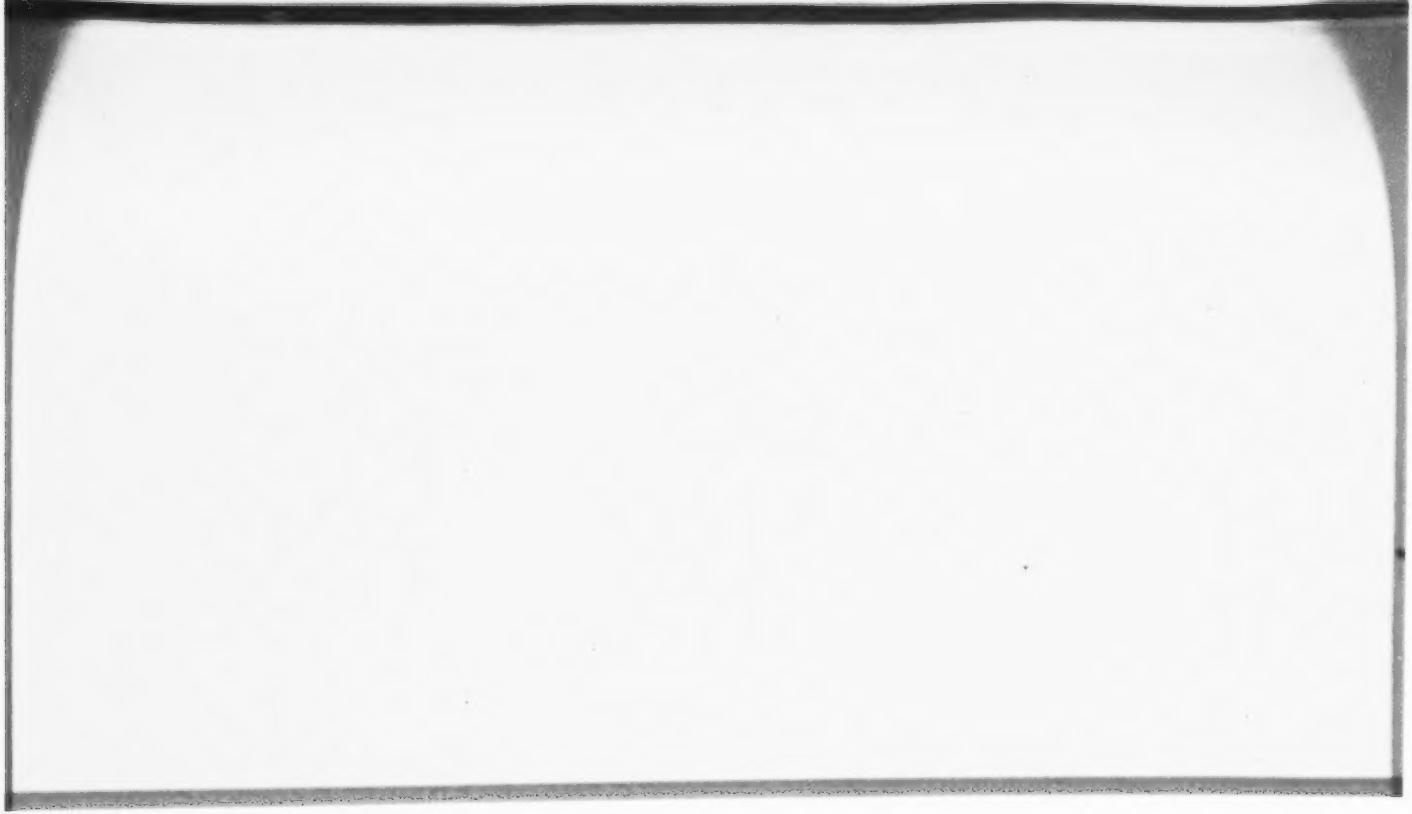
CASES CITED.



In the Supreme Court of the United States.

OCTOBER TERM, 1922.

FREDERICK WESCHE, APPELLANT, *v.* THOMAS W. MILLER, AS ALIEN PROPERTY Custodian.	No. 292.
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(Consolidated Cases.)

NO. 292, APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY; AND NOS. 575 AND 576, FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN.

HISTORY OF THE CASES.

PLEADINGS.

This action was begun by petition filed by Francis P. Garvan as Alien Property Custodian, wherein he alleged in substance that on or about December 19,

1917, the respondent Commercial Trust Company of New Jersey, acting in compliance with section 7 (a) of the Trading with the Enemy Act, filed a report that it held certain securities and money "in trust for the joint account of Frederick Wesche, of Paris, France, and Helene J. von Schierholz, of Plaue, Thuringen, Germany, to be delivered or paid to the said cestuis que trustent upon the demand of either, or of the survivor of them," which report was filed as Exhibit A to the petition; that on or about March 28, 1919, said respondent corporation reported to the Custodian by telegraph that it held for the benefit of the said cestuis que trustent the further sums of $39,190.76, designated as a checking account, and $18,159.69, designated as a trust account; that on or about June 19, 1918, A. Mitchell Palmer, as Alien Property Custodian, the petitioner's predecessor, determined that the said Helene J. von Schierholz was an enemy within the purview and meaning of the said Act, and therefore required the said respondent corporation to forthwith deliver to the Custodian all the property described in said reports; that said demand was served on said trust company on or about July 8, 1918, a copy of said demand being filed as Exhibit B; that on or about March 28, 1919, the petitioner further required the said trust company to deliver to him as Alien Property Custodian the said moneys and other properties, which demand was served on or about April 17, 1919, a copy of said demand being filed as Exhibit C, and that by virtue of said demands the petitioner was

vested with all the benefits in said money and other property; and it was prayed that the court issue a rule commanding in the alternative that the respondent deliver said properties to petitioner or, upon a day to be designated in said return, to show cause, if any there be, why the relief prayed for should not be granted. (Wesche Rec. 3–8; Com. Tr. Co. Rec. 2–5; Ahrenfeldt Rec. 2–5.)

In Exhibit A, the report of the Commercial Trust Company of New Jersey to the Custodian, it is recited that the name of the enemy interested in the trust fund was Helene J. von Schierholz, whose address was Schloss Plaue Thuringen, No. 3 Plaue, Thuringen, Germany; that the name of another person interested with Mrs. Schierholz was Fr. Wesche, whose last-known address was 130 Fauborg Street, St. Denis, Paris, France, whose interest was derived from the trust agreement attached to the report; and that on January 30, 1913, there was received for the account of Frederick Wesche, of Paris, France, and Helene J. von Schierholz, of Plaue, Thuringen, Germany, the bonds set out in the schedule annexed, having a par value of $524,000, "to be held for the joint account of the said Frederick Wesche and Helene J. v. Schierholz, and to collect the interest to become due and payable on said bonds for the joint account of the said Frederick Wesche and Helene J. v. Schierholz and to deliver over said bonds from time to time as requested, to the said Frederick Wesche, or to the said Helene J. v. Schierholz, or to the survivor of them, it being understood that the said

bonds and the said interest money to be collected thereon are to be held and collected and delivered or paid over to either the said Frederick Wesche or to the said Helene J. v. Schierholz, or to the survivor of them." (Wesche Rec. 16–18; Com. Tr. Co. Rec. 9, 10; Ahrenfeldt Rec. 9, 10.)

In the demand for the property made by Palmer as Custodian which is filed as Exhibit B to the petition it is recited that the Custodian "after investigation do determine that the following property, to wit: [describing it], is by you owing and belonging to and held for, by, on account of, and on behalf of, and for the benefit of Helene J. von Schierholz, address: Schloss Plaus Thuringen, No. 3 Plaue, Thuringen, Germany, whom after investigation I do determine to be an enemy not holding a license granted by the President." (Wesche Rec. 31, 33, 34; Com. Tr. Co. Rec. 17–19; Ahrenfeldt Rec. 16–19.) This demand was served on July 8, 1918. (Wesche Rec. 34, 38; Com. Tr. Co. Rec. 17, 19; Ahrenfeldt Rec. 17, 19.)

In the demand for the property made by Garvan, Custodian, which is filed as Exhibit C to the petition, it is recited that the Custodian "after investigation do determine that Helene J. von Schierholz, whose address is Schloss Plaus Thuringen, No. 3 Plaue, Thuringen, Germany, is an enemy (not holding a license granted by the President) and that the following property, right claim, or chose in action to wit: [describing the property], is by you

owing and held for, on account of, on behalf of and for the benefit of the said enemy." (Wesche Rec. 35–38; Com. Tr. Co. Rec. 20–22; Ahrenfeldt Rec. 20–22.) This demand was served on April 17, 1919. (Wesche Rec. 40; Com. Tr. Co. Rec. 23; Ahrenfeldt Rec. 23.)

Commercial Trust Company filed an answer on February 21, 1921, in which it admitted having made to the Custodian the report with reference to the property in question and its ownership as alleged in the petition (Wesche Rec. 42; Com. Tr. Co. Rec. 24; Ahrenfeldt Rec. 24); and the substance of the defense set up therein is as follows:

(1) That Palmer, as Custodian, neither personally nor otherwise made at any time investigation or determined after investigation that the securities and moneys mentioned in Exhibit B to the petition were either owing to or belonging to or held for, by, on account of, or on behalf of, or for the benefit of Helene J. von Schierholz, and that no investigation was made aside from receiving the report filed by the respondent, and that his decision was based solely upon recitals in said report, when at the same time the report showed that Frederick Wesche was both an owner and holder at law and interested as beneficial owner in the securities and moneys described in said report. (Wesche Rec. 44, 45; Com. Tr. Co. Rec. 25, 26; Ahrenfeldt Rec. 25.)

(2) That neither the said Palmer nor the petitioner ever inquired of said Wesche or anyone representing

him as to his rights or the rights of any other persons in said securities and moneys. (Wesche Rec. 45; Com. Tr. Co. Rec. 26; Ahrenfeldt Rec. 25, 26.)

(3) That the Alien Property Custodian secretly and without evidence, and without making investigation, and contrary to the information in his possession and to the proofs before him of the right of said Wesche, and in fraud of the rights of Wesche and Ahrenfeldt, both of whom resided abroad and to whom no recourse to any court was afforded, fraudulently pretended that he had duly investigated and had personally examined and passed on evidence obtained by an investigation of the rights and interest in such securities and moneys, and had fraudulently pretended to have determined after examination and investigation that said Wesche had no rights in such securities and moneys; and that the same belonged exclusively to said Helene J. von Schierholz. (Wesch Rec. 47, 48; Com. Tr. Co. Rec. 27; Ahrenfeldt Rec. 26.)

(4) That any such pretended holding was null and void, and did not constitute due process of law; that it was an attempt to deprive said Wesche and the other owners of their property without due process of law, and to take their said property for public use without compensation or opportunity to be heard, against the Fourth and Fifth Amendments to the Constitution of the United States; that such action was in excess of any powers that the Congress and the President could confer on the Custodian, and was

contrary to the provisions of the Trading with the Enemy Act and amendments thereto, and was contrary to any authority conferred by the President upon the Custodian under the provisions of said Act. (Wesche Rec. 48, 49; Com. Tr. Co. Rec. 27; Ahrenfeldt Rec. 28.)

The answer then states in detail the alleged facts with reference to the property in question and the citizenship of its owners, the substance of which is, that Frederick Wesche and Charles Ahrenfeldt were for years business associates; that said Ahrenfeldt died in 1893 and left an estate of large value to his three children to wit, Charles J. Ahrenfeldt, Helene J. Von Schierholz (née Ahrenfeldt), and Lucy Von Uxküll-Gyllenband (née Ahrenfeldt); that Charles J. Ahrenfeldt has at all times been an American citizen, and that since August 1, 1914, he has resided in England, France, or Switzerland, and has never been an enemy of the United States, and has not since August 1, 1914, been a resident of any judicial district of the United States (Wesche Rec. 55; Ahrenfeldt Rec. 30; Com. Tr. Co. Rec. 30, 31); that Mrs. Helene J. von Schierholz was an American citizen till the time of her marriage to Arthur von Schierholz, a German subject, on July 24, 1879; that her said husband died in January, 1899, and that she had been domiciled in Germany ever since April 6, 1917, and that prior to the passage of the act of June 5, 1920, she was without a license to deal with the properties in question save only such license as was given by

proclamation in 1919 (Wesche Rec. 50, 51; Ahrenfeldt 28; Com. Tr. Co. Rec. 28, 29); that Lucy Von Uxküll-Gyllenband was a citizen of the United States until she married a German subject about 1885, from whom she was divorced but married another German subject, Woldemar Von Uxküll-Gyllenband, in 1897, and had ever since resided in Germany (Wesche Rec. 55; Ahrenfeldt Rec. 30; Com. T. Co. Rec. 30, 31); that prior to January 30, 1913, Charles J. Ahrenfeldt, Mrs. Schierholz, and Mrs. Uxküll-Gyllenband had placed in Wesche's hands securities which had been derived from their father's estate with the understanding that, with the approval of said Ahrenfeldt, they might be reinvested by Wesche along with funds belonging to himself, and that while the amount of said properties should be kept several, yet the cash might be carried in the name of Wesche; that in 1913 it was agreed that certain securities and some cash then belonging to said parties but held by Wesche should be deposited by Wesche with the trust company in the joint name of Wesche and Mrs. Schierholz, each possessing the power to withdraw the same, but with the understanding and agreement between said four parties that Mrs. Schierholz should exercise such power only in case of disability of said Wesche, and then only with the responsibility to return to each his or her share thereof; that pursuant to that arrangement on January 30, 1913, said Wesche and Mrs. Schierholz entered into an agreement with the trust company, which was filed as Exhibit 60 to the answer (Wesche Rec. 56–58; Ahrenfeldt Rec. 31, 32;

Com. Tr. Co. Rec. 31, 32), which agreement or receipt was as follows:

> RECEIVED, Jersey City, January 30, 1913, for the account of Frederick Wesche, of Paris, France, and Helene J. v. Schierholz, of Plaue, Thuringen, Germany, the bonds particularly set out in the schedule or list hereto annexed and having a par value of five hundred and twenty-four thousand dollars ($524,000) to be held for the joint account of the said Frederick Wesche and Helene J. v. Schierholz, and to collect the interest to become due and payable on said bonds for the joint account of the said Frederick Wesche and Helene J. v. Schierholz and to deliver over said bonds from time to time as requested, to the said Frederick Wesche, or to the said Helene J. v. Schierholz, or to the survivor of them, it being understood that the said bonds and the said interest money to be collected thereon are to be held and collected and delivered or paid over to either the said Frederick Wesche or to the said Helene J. v. Schierholz or to the survivor of them. Upon all interest moneys collected on said bonds there is to be retained by the undersigned for its services in the premises 2 per cent of the amount so collected; *this* receipt is executed in triplicate. (Wesche Rec. 80; Ahrenfeldt Rec. 43, 44; Com. Tr. Co. Rec. 44)

A statement of the securities and cash owned by each of said parties and held by the trust company is then made. (Wesche Rec. 63–69; Ahrenfeldt Rec. 33–37; Com. Tr. Co. Rec. 33–37.)

APPLICATION OF FREDERICK WESCHE.

Frederick Wesche presented a petition praying that he be permitted to intervene and file an answer to the petition of the Custodian (Wesche Rec. 91; Com. Tr. Co. Rec. 50; Ahrenfeldt Rec. 50), and he presented along with his petition an answer which set up in substance the same facts as those alleged in the answer filed by the trust company (Wesche Rec. 95–140; Com. Tr. Co. Rec. 52–74). This application was disallowed (Wesche Rec. 166; Com. Tr. Co. Rec. 113).

APPLICATION OF CHARLES J. AHRENFELDT.

Charles J. Ahrenfeldt also presented a petition seeking permission to intervene and file an answer. (Ahrenfeldt Rec. 50; Com. Tr. Co. Rec. 77.) He presented with his petition an answer setting up the same facts as those stated in the answer filed by the trust company. (Ahrenfeldt Rec. 52–73; Com. Tr. Co. Rec. 79–100.) This application was denied. (Ahrenfeldt Rec. 79, 80; Com. Tr. Co. Rec. 106–107.)

ORDERS AND JUDGMENTS OF THE COURTS.

The Alien Property Custodian moved to strike out the answer of the trust company, which motion was denied. (Wesche Rec. 167, 168; Com. Tr. Co. Rec. 115; Ahrenfeldt Rec. 87.) On the hearing the Government introduced the exhibits filed with the petition, which consisted of (1) the report of the trust company to the Custodian, (2) the formal demand of A. Mitchell Palmer, Custodian, which recited the fact

of his having made an investigation and determination, and (3) the formal demand of the petitioner Garvan, which contained the recital of his investigation and determination as to the ownership of the property, and that it was held for an alien enemy. (Wesche Rec. 142–145; Com. Tr. Co. Rec. 101, 102; Ahrenfeldt Rec. 74, 75.) The facts alleged in the trust company's answer relating to the ownership of the beneficial interest in the property appear to have been treated as being admitted by the attorneys representing the Custodian. (Wesche Rec. 148, 169; Com. Tr. Co. Rec. 104, 116; Ahrenfeldt Rec. 77, 85.) The court on final hearing ordered that the Commercial Trust Company convey, transfer, assign, deliver, and pay over to Thomas W. Miller, Custodian, who had by previous order been substituted as petitioner, the securities and moneys described in the petition. (Wesche Rec. 170; Com. Tr. Co. Rec. 116; Ahrenfeldt Rec. 88.)

The ground upon which this order was primarily based appears from the following quotation from the memorandum opinion filed by the court:

> However, while the making of such determinations and demands with reference to the properties in question is not disputed, it is insisted that the preliminary investigation required by the Act was not made. But this challenge is met by the positive assertion in the determinations and demands that investigation was made. This precludes any further inquiry in proceedings like the present, instituted under Section 17 of the Act, which are

merely possessory. *Central Union Trust Co. of N. Y.* v. *Garvan*, U. S. — (decided Jan. 24, 1921); *Stoehr* v. *Garvan*, supra.

The Trust Company also claims that at most but a part of this property is owned by Mrs. von Schierholz, and that a proper investigation would have revealed that fact. Under the trust agreement herein set out the Trust Company held the securities therein referred to and the interest money to be derived therefrom, in trust "for the joint account of the said Frederick Wesche and Helene J. von Schierholz," and it was obligated to deliver or pay over such securities and interest "to either the said Frederick Wesche or to the said Helene J. von Schierholz, or to the survivor of them." So far as the Trust Company was concerned, it made no difference what were the relative rights of the cestius que trustent in and to these moneys and securities. It was bound to deliver them to either on demand. This being so, if either of these persons was an enemy within the meaning of the Trading with the Enemy Act, the Alien Property Custodian, by taking the requisite steps under the Act, which he did, would be substituted in the place of the enemy, and entitled to demand and recover the trust fund.

And again:

In the instant case the Trust Company's report to the Custodian showed that Mrs. von Schierholz was a resident of enemy territory, and that under the trust agreement she had a right to demand of the Trust Company that

> the moneys and securities in question be turned over to her. On that report alone the Custodian could justly determine that the properties were held for an enemy. Having so determined, his right to secure them can not be resisted or questioned by the Trust Company. This conclusion renders it unnecessary to consider any of the other grounds stated in the answer or briefs. (Wesche Rec. 160–162; Com. Tr. Co. Rec. 110, 111; Ahrenfeldt Rec. 83, 84.)

An appeal to this court was prosecuted by Wesche from the order of the court disallowing his intervention, and he has filed an assignment of errors which contains 95 specifications. (Wesche Rec. 175–202.)

The Commercial Trust Company prosecuted an appeal to the United States Circuit Court of Appeals, and there assigned 83 grounds of error. (Com. Tr. Co. Rec. 119–130.) The judgment of the district court was affirmed by that court, the court holding that in the cases of *Central Union Trust Company* v. *Garvan*, 254 U. S. 554, and *Stoehr* v. *Wallace*, 255 U. S. 239, all the questions involved had been determined, except whether the fact that Wesche, who was not an alien enemy, and Mrs. Schierholz, who was an alien enemy, each had the power upon his or her sole order to withdraw the property, made any distinction, and the court agreed with the district court that—

> the property in question being held for the joint account of a neutral and an alien enemy,

> and being in one aspect under the sole control of the alien enemy as to is [its] withdrawal, possession, and disposition, it was properly regarded, in this initial proceeding, as enemy-owned property liable to seizure by the Alien Property Custodian. Therefore, neither for itself as trustee nor for either cestui que trustent was the Trust Company justified in withholding a delivery of the property under the Act as it was passed and amended. (Com. Tr. Co. Rec. 148–149.)

The court further held that the Act as originally passed and amended has not been repealed or otherwise affected by the Armistice, the Peace Resolution of Congress, or the Treaty with Germany. (Com. Tr. Co. Rec. 147–149.) From the judgment there pronounced an appeal was taken to this court, and 95 grounds for error have been assigned, which present the same questions as those presented in the assignments of error filed by Wesche. (Com. Tr. Co. Rec. 150–162.)

Charles J. Ahrenfeldt took an appeal from the decree of the court disallowing his application for intervention to the United States Circuit Court of Appeals, and there filed 95 specifications of error which presented the same questions as those presented in the assignments of error filed in this court by Wesche and the trust company. (Ahrenfeldt, Rec. 91–104.) The judgment of the district court was affirmed, the circuit court of appeals holding that the district court was right in "holding that the questions sought to be litigated by Ahrenfeldt can be

raised only after the demand of the Alien Property Custodian has been complied with, and then only by proceedings authorized by section 9 of the act, as amended June 5, 1920," citing *Central Union Trust Company* v. *Garvan*, 254 U. S. 554, and *Stoehr* v. *Wallace*, 255 U. S. 239. (Ahrenfeldt Rec. 119.) From the judgment of the Circuit Court of Appeals an appeal was prosecuted by Ahrenfeldt to this court, and 98 specifications of error have here been filed which raise the same questions as those presented in the Court of Appeals. (Ahrenfeldt Rec. 120–134.)

BRIEF AND ARGUMENT.

I.

The Provisions in Question of the Trading with the Enemy Act Are Constitutional.

The question as to the constitutionality of the Act was raised and determined in *Stoehr* v. *Wallace*, 255 U. S. 239, 243, 244. However, it is here insisted by Wesche and Ahrenfeldt that that case is not conclusive because, when it was determined by the Custodian that the property belonged to or was held for, or on account of, an alien enemy and when demand was made for its delivery to the Custodian, they were residing, one in Switzerland, and the other in France, and no provision was made in the Act for the institution of a suit for the recovery of property by a claimant who was a nonresident of the United States.

The transactions which are material to the question here presented were had upon the following dates:

The determination by Palmer, Custodian, as to the ownership of the property or for whom it was held was made on June 19, 1918, and the demand was served on the 8th of July, 1918. (Wesche Rec. 34.) The determination of the ownership, etc., of the property by Garvan, Custodian, was made on March 28, 1919, and the demand was made on April 17, 1919. (Wesche Rec. 40.) The original petition was filed September 11, 1920. (Wesche Rec. 40.) The provision in Section 9 of the original Act (40 Stat. Ch. 106, Sec. 9, p. 420) relating to the institution of suits by a claimant was as follows:

> If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the alien property custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, etc. (40 Stat. page 420.)

On July 11, 1919, said Section 9 was amended so that the above provision read as follows:

> If the President shall not so order within sixty days after the filing of such application

> or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war institute a suit in equity *in the Supreme Court of the District of Columbia* or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed. (41 Stat. page 35.)

The contentions of Wesche and Ahrenfeldt can not be sustained for the following reasons:

1. They had a right before the amendment of July 11, 1919, to bring suit against the Alien Property Custodian in the District of Columbia, because the Alien Property Custodian resided, and his office was located, in that district.

The main purpose of the provision above quoted from Section 9 of the original Act was to provide a method for the recovery of property improperly seized, and the declaration as to the forum in which such action might be brought was merely an incident to that purpose. If the Act had said nothing about the jurisdiction within which the suit might be instituted it would have been controlled entirely by the general statute relating to the venue of actions; and the jurisdiction for all actions brought by claim-

ants would have been in the District of Columbia, as that was the official residence of the Custodian; but for the convenience of the claimants it was provided that they might institute suits in their own districts. That provision of course had no application to those who were residing abroad; and therefore the jurisdiction as to them was fixed by Section 51 of the Judicial Code, which provides that, except as provided in the six succeeding sections, "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

2. When this action was brought by the Alien-Property Custodian the statute had been so amended as to specifically give both Wesche and Ahrenfeldt the right to sue for the property in the District of Columbia.

As above stated, the statute amending the original Act in that particular was passed on July 11, 1919, while the petition in this case was not filed until September 11, 1920. (Wesche Rec. 40.) The property in question still remained in the possession of the Commercial Trust Company, and Wesche and Ahrenfeldt certainly had no right of action until it was removed from its possession. Therefore, if there had ever been any merit in their contention, the question had become a moot one before this action was instituted. So far as the trust company was concerned, by the express terms of the original statute it had a right to maintain a suit in the district wherein it was a resident; and that company therefore could not

question the constitutionality of the Act on the ground that it was not afforded the right to prosecute a suit for the return of the property.

3. The Commercial Trust Company was holding the property claimed by Wesche and Ahrenfeldt as their trustee, and it was its duty to protect and preserve the property for them; and said company had the right when the demand was made by the Custodian to maintain an action for its return for the benefit of Wesche and Ahrenfeldt in the district of which it was a resident.

II.

Neither the Commercial Trust Company, Wesche, nor Ahrenfeldt Can Have Adjudicated the Question of the Ownership of, or Rights in, the Property Before It Has Been Delivered to the Custodian.

As heretofore shown in the statement of the case, it was determined by both Palmer, Custodian, and Garvan, Custodian, that the property in question was owned by or held for the account of Mrs. Schierholz, an alien enemy not holding a license from the President, before the demand was made upon the trust company for the property.

While the answer of the trust company denies that such determination was based on any real investigation, yet it conclusively shows that sufficient information had been imparted to the Custodian to warrant such determination, as the trust company itself had reported to the Custodian that it was holding the property subject to the order of either Wesche or

Mrs. Schierholz, and that Mrs. Schierholz was an alien enemy. Whatever the actual facts may be, the case of *Central Union Trust Company* v. *Garvan*, 254 U. S. 554, has conclusively settled this question in favor of the United States. In that case the defense interposed by the trust company was that it held the funds in question for the security and benefit of American policyholders and creditors. The court refused to consider any such question, holding that it could not be raised by the trust company until it had delivered the property to the Custodian. Here the trust company claims that it was holding certain portions of the property in trust for American citizens; and therefore precisely the same question is presented as the court had before it in that case.

The fact that Wesche had equal power with Mrs. Schierholz to withdraw the property does not render the principle inapplicable. The provision of the statute relating to the ownership of the property reads as follows:

> If the President shall so require, any money or other property owing or belonging to *or held for, by, on account of, or on behalf of, or for the benefit of* an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian. (40 Stat., Ch. 106, sec. 7, subsec. (c), p. 418.)

Certainly the property in question was being "held for, by, on account of, or on behalf of, or for the benefit of" Mrs. Schierholz, as she had the power to demand and receive all of the property from the trustee. If it were not so held for her, it was not so held for Wesche; and appellants' contention leads to the absurd conclusion that it was not held by the trust company for anyone. Furthermore, as held by the court of appeals, the Custodian had the right to be substituted for Mrs. Schierholz; and as she had the right to demand the delivery to her of the entire property, when the demand for the property was made by the Custodian an equal right was vested in him. Anyway, it was determined by the Custodian that the property was held for Mrs. Schierholz, an alien enemy without a license; and that determination is conclusive of the case.

III.

The Right of the Custodian to the Possession of the Property Was Not Affected by the Armistice, or by the Termination of the War by Resolution of Congress and Proclamation of the President.

This question was before the Circuit Court of Appeals for the Second Circuit in *The Matter of the Application of Thomas W. Miller*, 281 Fed. 764, and the contention of appellants can not be better answered than by quoting the language of the court in that case, as follows:

> But it is said that the Custodian's right to seize the property was a war-time power which lapsed with the passing of a state of

war, and that on November 11, 1918, an armistice was entered into between the armed forces of the United States and those of the then Imperial German Government, and that on July 2, 1921, there became effective a joint resolution of Congress approved and signed by the President, which declared the state of war formerly existing with the Imperial German Government to be terminated and at an end. This, it is said, rendered of no force or effect as to subsequent matters any prior determinations by the Alien Property Custodian to the effect that Helene Kyriss and Amalia Janner or either of them was or is an alien enemy; that the said Amalia Janner and Helene Kyriss are not alien enemies and that neither of them is an alien enemy and that each of them is a citizen or subject of a country with which the United States of America is at peace and is entitled to all the protection to her property rights to which any alien is entitled within the United States, and also is entitled to all protection, rights, privileges, and immunities, both as to personal and property rights appertaining to citizens or subjects of Prussia or of the sovereignty succeeding to the rights and place of Prussia under the treaties between Prussia and the United States.

We are unable to assent to the proposition. It is difficult to appreciate the reasoning upon which it is based. So long as the United States was officially at war the courts can not say that it was in reality at peace. The joint

resolution of Congress adopted July 2, 1921, declared the war at an end. (42 Stat. 105.) And on November 11, 1921, the President issued his Proclamation in which he declared "that the war between the United States and Germany terminated on July 2, 1921." Under the definition of the "end of the War" contained in the Trading with the Enemy Act, July 2, 1921, must be regarded for the purposes of that Statute as the termination of the war.

On March 3, 1921, Congress passed a joint resolution declaring that the date of the passage of the resolution in the interpretation of any provision relating to the duration or date of the termination of the war should be treated as the date of the war's termination, excepting, however, from the operation and effect of the resolution certain Acts and among them the Act known as the Trading with the Enemy Act, and all amendments thereto.

The Congress thereafter passed a further Joint Resolution which the President approved on July 2, 1921. It declared that the state of war existing between the United States and Germany was at an end, but that resolution specifically provided in Section 5 as follows:

"All property of * * * German nationals which was on April 6, 1917, in or has been since that date come into the possession or under control of or has been the subject of a demand by the United States of America, or of any of its officers, agents, or employees, from any source or by any agency whatsoever, * * * shall be retained by the United States of America and no disposition thereof

made, except as shall have been heretofore or specifically hereafter shall be provided by law, until such time as the Imperial German Government * * * shall have * * * made suitable provision for the satisfaction of all claims." (42 Stat. 106.)

As the demands made by the Custodian, and upon which this proceeding was instituted, were made after April 6, 1917, and prior to the adoption of this resolution, the Custodian's right to the possession of the property demanded may still be enforced.

In *Kahn* v. *Anderson*, 255 U. S. 1 (41 Sup. Ct. 224; 65 L. Ed. 469), the Supreme Court declared that it was not disputable that complete peace had not come to pass by the effect of the Armistice and the cessation of hostilities. And Chief Justice White, speaking for the court, said it was difficult to appreciate the reasoning upon which it was insisted that although the Government was officially at war, nevertheless so far as the regulation of the army was concerned it was at peace.

In *Vincenti* v. *United States* (C. C. A.), 272 Fed. 114, the Circuit Court of Appeals for the Fourth Circuit, construing the words "the conclusion of the present war," held that the Government was still at war at the time of its decision, which was on March 4, 1921. The Supreme Court refused a writ of certiorari. (256 U. S. 700; 41 Supt. Ct. 538; 65 L. Ed. 1178.) And if a state of war legally existed on March 4, 1921, the seizure or demand by the Custodian made upon the trustees on February 4, 1921, was a legal seizure or demand

under the Trading with the Enemy Act, which Act did not expire until five months later.

For the foregoing reasons, the judgment of the District Court in No. 292 and the judgments of the Circuit Court of Appeals in Nos. 575 and 576 should be affirmed.

JAMES M. BECK,
Solicitor General.

JAMES A. FOWLER,
Special Assistant to the Attorney General.

MARCH, 1923.

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